



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

CASE NO. 16763/13

In the matter between:

17/10/2013

TSHIFIWA VICTOR MPHIGALALE

APPLICANT

and

THE BODY CORPORATE OF PROTEA ESTATE

1st RESPONDENT

PEDRO CLOETE N.O.

2ND RESPONDENT

JUDGMENT

HASSIM A AJ

1. The applicant is a resident and owner of a sectional title unit in Protea Estate. The First Respondent is the Body Corporate of Protea Estate created in terms of the provisions of the Sectional Titles Act 95 of 1986 (the Act).
2. The first respondent claims arrear levies from the Applicant. It is common cause that the applicant is in arrears and is liable for payment of past

levies, but there is dispute as to the amount. The applicant denies that the amount being claimed is accurate.

3. The dispute was referred to arbitration in terms of the prescribed Management Rule 71 (1) and (2), contained in Annexure 8 of the Sectional Titles Act. These provisions provide:

“(1) Any dispute between the body corporate and an owner or between owners arising out of or in connection with or related to the Act, these Rules or the conduct rules, save where an interdict or any form of urgent or other relief may be required or obtained from a Court having jurisdiction, shall be determined in terms of these Rules.

(2) If such a dispute or complaint arises... and Not be resolved.. either of the parties may demand that the dispute or complaint be referred to arbitration.”

4. The applicant seeks orders preventing the first respondent from proceeding with the arbitration and declaring that the arbitration process is an invalid process to resolve the dispute between the parties.
5. Counsel for the applicant made two submissions in this regard: that the applicant did not consent to the arbitration and that the notices that are required to be served on trustees and managing agents were not so served and therefore the process is invalid. In relation to this second argument, no averment to that effect was made in the founding papers, and the respondents were not put to the proof thereof. During argument counsel for the applicant conceded that the issue was raised for the first time in argument. I therefore cannot make a finding in favour of the applicant in this regard.
6. It is common cause however that the relevant notices were sent to the applicant. However, the applicant contends that he has not consented to the arbitration process once the notices were served.

7. I turn then to the first argument: that is, that the applicant did not consent to the arbitration.

8. The legislative framework relating to the management and control of sectional title schemes is set out in the Act. Section 35(1) provides that the sectional title shall be controlled by rules as from the date of the establishment of the body corporate, subject to the provisions of the Act.

9. Section 35(2) reads :

“(2) The rules shall provide for the control, management, administration, use and enjoyment of the sections and the common property and shall comprise –

(a) management rules, prescribed by regulation, which rules may be substituted, added to , amended or repeal by the developer when submitting an application for the opening of a sectional title register, to the extent prescribed by regulation, and which rules may be substituted, added to, amended or repealed from time to time by unanimous resolution of the body corporate as prescribed by regulation...”

10. In terms of Regulation 30 (1) made in terms of the Act, the management rules contemplated in section 35 (2)(a) of the Act shall be those rules as set out in Annexure 8 to the Regulations.

11. It is common cause that there was no amendment, additions or other changes effected to the rules by the developer, and that it is the rules contained in Annexure 8 of the Regulations that govern this matter.

12. In *Body Corporate Pinewood Park v Dellis (Pty) Ltd* 2013 (1) SA 296 (SCA) at para 15, Mpati P held as follows:

"It is a matter of pure logic that, when a purchaser purchases a unit in a sectional title scheme after a section title register has been opened, he or she would be deemed to have consented, or agreed, to be bound by the existing rules relating to that scheme...It seems to me therefore that the arbitration procedure provided for in management rule 71 is consensual."

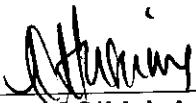
13. Despite this, counsel for the applicant sought to rely on *Body Corporate of Greenacres v Greenacres Unit 17 CC 2008 (3) SA 167 (SCA)* in that the SCA did not find that arbitration was compulsory. Indeed, the court in that case left the question open. The judgment in *Pinewood* has since resolved the point. But I need not dwell on this point any further since the notion of 'compulsory arbitration' that was being considered by the SCA was whether or not the arbitration procedures under the Act are excluded by virtue of section 40 of the Arbitration Act. Mpati P clarified that the management rules are consensual or contractual in nature and that the arbitration process provided for by Rule 71 is not prescribed by an Act of Parliament or Regulations and therefore does not fall within the ambit of the exclusion in Section 40 of the Arbitration Act.

14. The undisputed fact in this matter is that the applicant contractually agreed to the arbitration process upon purchasing the sectional title unit.

15. The applicant made no averments in the founding affidavit as to the prejudice that would flow to him should the arbitration proceed.

16. I therefore make the following order:

16.1. The application is dismissed with costs.


JUDGE HASSIM A AJ